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Subject: Prior-checking notification case 2013-0672 (DPO-3641.1)

Dear Ms DI BUCCI,

We have analysed the documents you have provided to the EDPS concerning the notification for prior-checking under Article 27 of Regulation EC No 45/2001 ("the Regulation") on the processing of personal data in the context of the call for expressions of interest for contract staff in Nicosia/Cyprus within DG Enlargement ("DG ELARG").

The EDPS points out that this case will be analysed in light of the EDPS Guidelines on staff recruitment ("the EDPS Guidelines"), which also contain stipulations relating to initial selection procedures.

On this basis, in this letter the EDPS will only identify and examine the European Commission (EC) practices which do not seem to be in conformity with the principles of the Regulation and the EDPS Guidelines, providing relevant recommendations. It is noted that this case has some similarities with other processing operations relating to selection and recruitment by the EC¹. However, the EC has clarified that case 2013-0672 differs from previous cases because it does not aim at the recruitment of contract agents, but is solely limited to the establishment of a reserve list (which may be used for recruitment at a later stage). That said, it is important to note that any EDPS recommendations issued to the EC on previous recruitment cases will remain valid if they can be applied to an equivalent aspect of this particular processing operation.

¹ Including cases: 2009-570 on "Procurement procedures and call for expression of interest for selection of experts"; 2011-559 on the "Selection procedure for temporary agents for posts other than supervision and advice without EPSO concurs"; and 2011-820 on "Procédures de selection des agents contractuels dans les services de la Commission".

The EDPS regrets that this processing operation was only submitted to him on 19 June 2013 after it had already been launched. Notifications for prior checking should be submitted before the start of the processing operation, so that any recommendations made can be taken into account before starting to process personal data.

Legal Analysis

1) Legal basis and lawfulness of the processing operation

The notification only makes reference to one legal basis for the processing. Namely: *Council Regulation (EC) No 389/2006 of 27 February 2006 establishing an instrument of financial support for encouraging the economic development of the Turkish Cypriot community and amending Council Regulation (EC) No 2667/2000 on the European Agency for reconstruction*. However, this is not mentioned in the privacy statement, which instead cites CEOS and the associated Commission Decision.

Recommendation: The cited legal bases for the processing should be consistent on both the notification and privacy statement. The EC should make the relevant amendments, and submit the updated documents to the EDPS.

2) Data Quality

In section 9(a) of the application form for the selection of contract staff, the EC asks for basic information about criminal convictions, including details about the potential offence, facts of the case, and whether an appeal is pending. The EC has confirmed that candidates are not required to send in any documentary evidence at this stage, but limit themselves to self-declarations in the understanding that documentary evidence will be requested if and when a subsequent recruitment procedure is initiated.

However, as noted in the EDPS Guidelines, questions relating to past convictions are excessive in terms of the application process. The procedure in question only aims at the selection of applicants for a reserve list, which will not necessarily result in subsequent recruitment. As such, criminal record information should not be required at such an early stage. Although the application form contains a footnote to indicate that this information will not result in exclusion from the selection procedure, this type of question may result in a situation where candidates feel obliged to reveal data unnecessary for this stage of the process. Similarly, sections 9(b) and (c) of the application form (which relate to legal action and civil rights) could also be considered excessive under the same premise, as could the request under section 7 which asks candidates to specify reasons for any breaks in professional activity.

Recommendations: Section 9 of the application form should be removed. Instead, applicants should be informed that they will be asked to provide a current criminal record or similar official document issued in accordance with the respective national law, only in cases where they progress to a subsequent recruitment procedure. This should also be made clear in the privacy statement. In addition, the EDPS Guidelines conclude that questions related to the “reasons for leaving a previous post” are excessive in relation to the recruitment procedure, and therefore recommend that their mandatory nature is reconsidered. Whilst the EC application form does not directly refer to reasons for leaving a previous post, reasons for breaks in professional activity could be considered as similar. As such, the EDPS recommends that the provision of this information is rendered optional.

The revised application form and privacy statement should then be provided to the EDPS for review.

3) Data retention

Regarding the conservation and retention of data, the EDPS Guidelines highlight the need to differentiate between three different categories of data subjects, specifically the recruited applicants, the non-recruited applicants and the non-recruited applicants whose names were put on the "reserve lists for appointment". The data related to evaluation results regarding all stages of the selection procedure should be kept in accordance with the retention period of each category of data subject. The EDPS recognises that the situation in this case is somewhat different as recruitment itself is not covered, only the selection procedure. However, the EDPS Guidelines should still be fully respected in terms of retention, where applicable. Currently, it is not entirely clear how the EC's retention periods correspond to the relevant categories.

Although not directly relevant to this processing operation, as regards the *recruited applicants* whose data should be stored in their personal file (Article 26 of the Staff Regulations), the EDPS recommends that a data retention period of ten years as of the termination of employment or as of the last pension payment is considered to be reasonable.

The retention period for data relating to the *non-recruited applicants on the "reserve lists for appointment"* is to be determined in terms of the validity and the actual extension of the respective reserve lists. An additional period of two years can be added to the validity of the reserve list to cover the length of time during which a complaint may be brought to the European Ombudsman.

As to the *non-recruited applicants*, the EDPS acknowledges that the time-limit for storage of such data shall be set in relation to the time-limits to be established for the possible review of the decision taken in the selection procedure (complaint to the European Ombudsman, appeal with the Civil Service Tribunal), as well as in accordance with Article 48 of the Implementing Rules to the Financial Regulation (only for the documents necessary for budgetary and audit purposes). It is worth noting that in various opinions the EDPS accepted to keep personal data of unsuccessful candidates for two or three years *following the recruitment procedure* as that period was derived from the length of time during which a complaint may be brought to the European Ombudsman.

Recommendation and reminder: The EC should ensure that these categories (where applicable) are in accordance with the EDPS position, and clearly specified/differentiated on both the notification and privacy statement. Updated versions of these documents should be submitted to the EDPS once any relevant clarifications have been made. The EDPS would also remind the EC that selection and recruitment does not require the collection and storage of original supporting documents but rather copies, certified copies or official certified translations.

4) Information to be given to data subjects

As explained in the EDPS Guidelines, Articles 11 and 12 of Regulation 45/2001 provide that data subjects must be informed of the processing of data relating to them, and list a range of general and additional items.

It is important that all elements listed in both Articles 11 and 12 respectively are clearly and thoroughly mentioned in the privacy statement. In particular, the statement should clearly

indicate which questions in the application form are mandatory or optional. Moreover, in some cases, although applicants are selected on the basis of their qualifications, the issue of maintaining an appropriate geographical distribution and gender balance during the selection is also taken into consideration. If this is the case with DG ELARG, the privacy statement should make reference to this aspect of the selection procedure, so that the fairness of the processing in respect of the data subject can be guaranteed.

Additionally, the section of the privacy statement relating to *data recipients* makes reference to a “reasoned report”, although there is no explanation of what this report is. The EC has since clarified that the reasoned report will be established by the selection panel and will provide a concise overview of the selection procedure and outcome of the call for expressions of interest for contract staff in Nicosia/Cyprus.

Recommendations: A brief definition of the “reasoned report” should be added to the privacy statement, so that data subjects have a full understanding of what this document contains. The EC is also reminded that unless an exemption applies under Article 20(1)(c), data subjects should be granted access to this report, as it forms an integral part of the selection procedure (see “right of access and rectification” under point 5 below). Clarifications should also be added to the privacy statement in terms of mandatory or optional questions, and gender balance/geographical distribution, if applicable. An updated version of the privacy statement should be submitted to the EDPS once the relevant changes have been made.

5) Rights of access and rectification

As outlined in the privacy statement, the data subject has the right to access and/or rectify his or her data by sending an e-mail to the functional mailbox of ELARG 02, with a copy of an identity document. Aggregated results on selection can also be provided on the candidate’s request.

Reminders and recommendation: Whilst nothing in the notification would suggest that the right of access is unduly limited, the EDPS would nevertheless like to remind the EC (as in previous Opinions) that data subjects should be given access to their evaluation results regarding all stages of the selection procedure, including the reasoned report of the selection panel, unless the exception of Article 20(1)(c) of the Regulation is applied. This exception may imply that access should be granted neither to the comparative data concerning other applicants (comparative results), nor to the individual opinions of the members of the selection panel if such access would undermine the rights of others applicants or the freedom of members of the selection panel. If a restriction provided for by Article 20(1) of the Regulation is imposed, the data subject should be informed of the principal reasons on which the application of the restriction is based and of his or her right to have recourse to the EDPS.

As concerns the right of rectification, the EDPS points out that any limitation on the right of rectification after the closing date of submitting applications should only apply to data related to the admissibility criteria and not to the identification data that can be rectified at any time during the selection procedure. The EDPS considers this limitation necessary for the fairness of the selection procedure and justified in terms of Article 20(1)(c) of the Regulation. It is however important that all applicants are informed about the scope of this restriction before the beginning of the processing operation, and the privacy statement should clearly state that, in the case of data related to the admissibility criteria, the right of rectification cannot be exercised after the closing date of candidatures' submission. The EC should incorporate this clarification into the privacy statement and submit an updated version to the EDPS for review.

Conclusion

The EDPS recommends that the EC adopts specific and concrete measures to implement the above recommendations regarding the processing of personal data in the context of the call for expressions of interest for contract staff in Nicosia/Cyprus within DG ELARG.

To facilitate our follow-up, it would therefore be appreciated if you could provide the EDPS with all relevant documents within 3 months of the date of this letter to demonstrate that all recommendations and reminders have been implemented.

Kind regards,

(signed)

Giovanni BUTTARELLI

Cc: Mr Philippe RENAUDIÈRE – Data Protection Officer
Ms Samantha BISTON – Delegate